IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5952

DETA MONA TRIMBLE and JESSIE TRIMBLE,

Appellants,

v.

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, AND MARY LOIS GORDON,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF APPELLEE, ETHEL MAE KING

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AUTHORITIES CITED

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SUMMARY OF ARGUMENT

I. Illinois inheritance laws which prohibit an illegitimate child from inheriting from his father but allowing him to inherit from his mother are reasonably and rationally related to a legitimate state purpose and do not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

A. The test for determining whether section 12 of the Illinois Probate Act violates the Equal Protection Clause is whether it bears a rational relationship to a legitimate state purpose. In the area of economics and social welfare a law is not unconstitutional merely because a classification it creates is imperfect, is not made with mathematical nicety or results in some inequality. Since no case dealing with the rights of illegitimate children has held that discrimination against them is "suspect" thus invoking the strict scrutiny test, it is clear that in order for section 12 to be declared valid, it need only bear a rational relationship to a legitimate state purpose.

B. No "right to inherit" is guaranteed by the Constitution, therefore the State of Illinois has a legitimate interest in regulating the disposition of property within its borders that was owned by its citizens who die intestate. That right has been exercised by the legislature in the adoption of the Probate Act which gives citizens of Illinois almost complete freedom of testamentary disposition of their property.

A child, whether legitimate or illegitimate has no right to receive any portion of his parents' estates and may be wholly disinherited, except for a statutory child's award.

The Illinois statutory scheme also provides for the distribution of property of a decedent who dies intestate. Applying the Illinois rules of descent and distribution to the facts of this case, the decedent's estate will be shared equally by his parents, brothers and sisters and the illegitimate child receives nothing.

The purpose of these rules of descent and distribution is to provide an Illinois citizen with a method of disposing of his assets at death without the necessity of

making a will and that has been recognized as a legitimate state purpose by the decision of this Court in *Labine v. Vincent*. The Probate Act has therefore created a "statutory will" to be utilized by those citizens who do not choose to make a will. The power to make a will is in the testator and since the decedent here failed to do so, it must be presumed that he intended to leave his property according to the statutory scheme and thereby disinherit his illegitimate daughter.

Illinois also has a substantial and legitimate interest in seeing that controversies over the property and estates of decedents be speedily and finally determined and that spurious claims of paternity and heirship not be made. That purpose is fulfilled by section 12 of the Probate Act, the effect of which could have been avoided by the decedent here, had he chosen to make a will.

II. The precise issue presented by this case has been previously decided by this Court in *Labine v. Vincent* wherein a Louisiana statute that precluded acknowledged illegitimate children from inheriting equally with legitimate children was declared valid and not violative of the Equal Protection Clause. *Labine* has continuing and present vitality, is dispositive of the issue here and should be followed as controlling precedent.

The *Labine* decision has been followed by the courts in other cases. The doctrine of *stare decisis* would dictate that this Court now follow *Labine* and uphold the validity of the statute in question here.

III. Section 12 of the Illinois Probate Act treats male and female illegitimate children on exactly the same basis and makes no differentiation between them as to inheritance rights. Neither are allowed to inherit

from their fathers and therefore there is no denial of equal protection to the child on the basis of sex.

The argument of *amicus* that section 12 discriminates against the father because it deprives him from providing for his illegitimate child upon death unless he makes a will is without reason because the father is not a party to this case and any issue of a father being discriminated against because of his sex is not present.

The further argument of *amicus* that the right of a person to dispose of his or her property intestate is a fundamental right thus causing it to be measured by a strict standard of review is without merit because sex is not a "suspect" classification and *amicus* cites no case to support its theory.

No decision of this Court has definitively held that sex is a "suspect" classification, therefore a sex classification must be judged on whether it bears a rational relationship to a legitimate state purpose. In this case that purpose is to prevent false and spurious claims of paternity, and since there is a biological difference between mothers and fathers, it is a necessary distinction.

IV. The issue of the alleged denial of equal protection on the basis of sex has not been properly preserved for review by this Court because it was not raised in the trial court.

ARGUMENT

I.

ILLINOIS INHERITANCE LAWS WHICH PROHIBIT AN ILLEGITIMATE CHILD FROM INHERITING FROM HIS OR HER FATHER ARE REASONABLY AND RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE, ARE THEREFORE CONSTITUTIONAL AND DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Introduction

The State of Illinois has adopted a statutory scheme to regulate the disposition of property within its borders that was owned by its citizens who die intestate. The statutory provision at issue in this case provides that an illegitimate child can only inherit from or through his or her mother and not from or through his or her father when the parent dies intestate. Ill.Rev.Stat. 1975, ch. 3, §12. Appellants contend that the foregoing provision violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the class of illegitimates is "suspect", and the application of strict judicial scrutiny to this classification demonstrates invidious discrimination. Appellee respectfully submits that the statutory provision in question has a rational relationship to a legitimate state purpose and therefore satisfies the test to determine the validity of a statute under the Equal Protection Clause and is thus constitutional.

A. The test for determining the validity of the statute is whether it bears a rational relationship to a legitimate state purpose

The rules for testing alleged discrimination under the Equal Protection Clause of the Fourteenth Amendment were summarized in *Morey v. Doud*, 354 U.S. 457, 1 L.Ed.2d 1485 (1957) as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (354 U.S. at 463-64, 1 L.Ed.2d at 1490) (citation omitted)

In *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491 (1970) this Court was called upon to decide the constitutionality of a Maryland statute which imposed a maximum limit on the total amount of aid which any one family unit could receive under the Federal Aid to Families With Dependent Children program. The District Court had decided that the statute was in

conflict with the federal statute and was also violative of the Equal Protection Clause of the Fourteenth Amendment. Mr. Justice Stewart, speaking for the majority, first decided that there was no statutory conflict and then addressing himself to the equal protection issue, stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S. Ct 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 US 61, 69-70, 57 L Ed 730, 734, 33 S Ct 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 US 420, 426, 6 L Ed 2d 393, 399, 81 S Ct 1101.
>
> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. See Snell v. Wyman, 281 F Supp 853, aff'd, 393 US 323, 21 L Ed 2d 511, 89 S Ct 553. It is a standard that has consistently been applied to state

legislation restricting the availability of employment opportunities. Goesaert v. Cleary, 335 US 464, 93 L Ed 163, 69 S Ct 198; Kotch v. Board of River Port Pilot Comm'rs, 330 US 552, 91 L Ed 1093, 67 S Ct 910. See also Flemming v. Nestor, 363 US 603, 4 L Ed 2d 1435, 80 S Ct 1367. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally valid. We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." (397 US at 485-486, 25 L Ed 2d at 501-02) (footnotes omitted)

In citing, among others, *Morey*, this Court, more recently in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, 31 L.Ed.2d 768, 777 (1972) stated:

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose."

San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973) holds that in determining the validity of a state's statutory system for financing public education the proper standard for judicial review under the Equal Protection Clause of the Fourteenth

Amendment is whether or not that system bears some rational relationship to a legitimate state purpose.

Clearly then, the test to be applied to determine the constitutionality of the challenged provision of the Illinois Probate Act is whether the different treatment of illegitimate and legitimate children in relation to intestate succession from their fathers is rationally and reasonably related to a valid and legitimate state purpose. Appellants' argument that strict scrutiny must be utilized in testing the validity of the statute is not well taken. Indeed, appellants recognize that no case[1]

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[1] *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 31 L.Ed.2d 768 (1972) wherein the issue was whether the Louisiana workmen's compensation law discriminated against illegitimate children of the workmen; *Levy v. Louisiana*, 391 U.S. 68, 20 L.Ed.2d 436 (1968), where the issue was the validity of the Louisiana wrongful death statute which did not allow illegitimate children to recover for the wrongful death of their mother; *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 20 L.Ed.2d 441 (1968) in which that portion of the Louisiana wrongful death statute which did not allow the mother of an illegitimate child to bring an action for the child's death was held invalid; *Jiminez v. Weinberger*, 417 U.S. 628, 41 L.Ed.2d 363 (1974) where the issue was the validity of that section of the Social Security Act that denied benefits to illegitimate children of a disabled father who became disabled before the children were born; *Labine v. Vincent*, 401 U.S. 532, 28 L.Ed.2d 288 (1971), a case almost identical to the one at bar where a Louisiana statute barring illegitimates from inheriting from their fathers was upheld; See also *Gomez v. Perez*, 409 U.S. 535, 35 L.Ed.2d 56 (1973); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir., 1973), *aff'd.* 418 U.S. 901 (1974);

dealing with the rights of illegitimates has held that class to be "suspect" thus invoking the test of strict scrutiny rather than the rational or reasonable basis test.

B. The Illinois laws of descent are a valid exercise of the State's legitimate interest in regulating the disposition of the property of citizens who die intestate

The question for determination is whether the distinction between the treatment of legitimate and illegitimate children in inheriting from their fathers as provided by the Illinois Probate Act is reasonably and rationally related to a legitimate state purpose or does it constitute invidious discrimination thereby violating the Equal Protection Clause.

Appellee submits that since there is no "right to inherit" guaranteed, either explicitly or implicitly, by the Constitution of the United States, the State of Illinois has a legitimate and valid interest in regulating the disposition of property within its borders that was owned by its citizens who die intestate.

Illinois has exercised that interest by the adoption of its Probate Act (Ill.Rev.Stat. 1975, ch. 3) which gives citizens of Illinois almost complete freedom of testamentary disposition of their property. Section 42 of the Act provides that every person of the age of 18 years who is of sound mind and memory has the power to determine how his property will be devised and bequeathed at the time of his death by the execution of a will. Ill. Rev. Stat. 1975, ch. 3, §42. Residents of Illinois may also utilize other means to determine to

whom their property will pass at death, including *inter alia* joint tenancies, Ill. Rev. Stat. 1975, ch. 76, §§1 *et. seq.*, trusts, Ill. Rev. Stat. 1975, ch. 148, §101-120, and designation of beneficiaries in life insurance policies.

The Probate Act does impose certain restrictions on a testator's disposition of his property. A surviving spouse may renounce the will and take a statutory share of the estate, Ill.Rev.Stat. 1975, ch. 3, §§16, 16a and 17, and if children of the testator are born after the will is executed and the will does not either provide for after-born children or indicate an intent to disinherit them, these children are entitled to that share of the estate which they would have received if their parent had died intestate. Ill.Rev.Stat. 1975, ch. 3, §48. The Act also contains provisions for a surviving spouse's award, Ill.Rev.Stat. 1975, ch. 3, §178, and an allowance to child, Ill.Rev.Stat. 1975, ch. 3, §179, which are but means to afford temporary support to them during the nine month period following the decedent's death in a manner suited to the condition in life of the recipient and also suited to the condition of the estate.

Thus, apart from the restrictions noted above, a decedent in Illinois may divide his property as he sees fit, and children of a decedent, whether legitimate or illegitimate, have no right to receive either support from his estate or property or to receive any portion of that estate or property, and in effect, except for the child's award previously referred to, may be wholly disinherited. *Daly v. Daly*, 299 Ill. 268, 132 N.E. 495 (1921); *Butz v. Butz*, 13 Ill.App.3d 341, 299 N.E.2d 782 (1973).

The intermediate reviewing court in *In Re Estate of Karas*, 21 Ill.App.3d 564, 315 N.E.2d 603 (1974)

disposed of an argument based on the alleged rights of children to inherit from their parents in the following language:

> "The petitioner's strongest argument is that the statute unreasonably discriminates between legitimate and illegitimate children whose fathers die intestate, because the illegitimates may not inherit in this circumstance, unless they are acknowledged by their fathers and their parents intermarry. But the principal flaw in this argument is the *sine qua non* assumption that, under Illinois law, children somehow have a basic *right* to inherit from their parents. *There is no such right under Illinois law.* It is the parent's, not the child's right to elect how much and to whom (except for the spouse's statutory share) his property shall pass on his death, and the only real issue in such a case is what did the parent intend when he died leaving no will." (315 N.E.2d at 606)

The people of Illinois acting through their elected representatives, the General Assembly, have further provided in the same Probate Act for the distribution of any property of a decedent who dies without executing a will or otherwise disposing of his assets. Ill.Rev.Stat. 1975, ch. 3, §§11-18, 41. Section 11 (4)[2]

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[2]"§11. Rules of Descent and Distribution.)

The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:

* * *

(4) If there is no surviving spouse or descendant but a parent, brother, sister, or descendant of a brother or sister of the decedent; the entire estate to the parents, brothers and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living."
(Ill.Rev.Stat. 1975, ch. 3, §11(4))

of the Act governs the factual situation in this case and provides that Sherman Gordon's parents, brothers and sisters equally share his entire estate because he died leaving no surviving spouse or descendants. As previously noted, section 12[3] of the Act precludes his illegitimate daughter, Deta Mona Trimble from inheriting from him.[4]

The effect of these statutory provisions, however harsh it might be on the child, bears both a reasonable

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[3]"§12. Illegitimates.

* * *

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate."
(Ill.Rev.Stat. 1975, ch. 3, §12)

[4]It is clear that an illegitimate child had no common law right to inherit from either of his parents under the doctrine of *filius nulius*. In providing that an illegitimate is the heir of his mother, the Illinois General Assembly has created a statutory right in the illegitimate previously unknown to him. It is generally accepted that where the legislature creates a right by means of a statute, it may place any limitation it deems appropriate upon the exercise of that right or the remedy for its enforcement without violating the Equal Protection Clause of the Fourteenth Amendment. (See *Coy v. Folsom*, 228 F.2d 276 (3rd Cir., 1955) It is respectfully submitted that since the Illinois General Assembly has created a statutory right of an illegitimate to inherit from his mother, previously unknown to common law, the fact that the right is limited in that it does not provide for inheritance from the father does not offend equal protection under the Fourteenth Amendment.

and rational relationship to the legitimate state purpose of controlling the disposition of property owned by its citizens who die intestate. This proposition was most cogently stated by the Supreme Court of Minnesota in its opinion in the case of *In Re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed*, 402 U.S. 903, 28 L.Ed.2d 644 (1971):

> "Even though some better way might be devised to further mitigate the inhuman effect of the common-law rule, we are compelled to hold that the challenged provision of §525.172[5] is constitutional, for it cannot be said that the line it draws between the right of legitimates and illegitimates seeking to inherit from a father is irrational or bears no intelligible proper relationship to the purposes sought to be achieved by this and other sections of our Probate Code governing the descent of property upon death." (178 N.W.2d at 718) (footnote supplied)

The real purpose of the rules of descent and distribution is to provide a resident of Illinois with a method of disposing of his assets at death without the necessity of making a will or other similar arrangements. That the various states have an interest in

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[5]Section 525.172 provides:

> "An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted; but such child shall not inherit from the kindred of either parent by right of representation."

regulating the disposition of intestate property was recognized by this Court in *Labine v. Vincent*, 401 U.S. 532, 538, 28 L.Ed.2d 288, 294 (1971) thusly:

> "But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State."

The continuing vitality of *Labine* in this regard was indicated in the opinion in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 and n.8, 31 L.Ed.2d 768, 776 and n.8 (1972) wherein Mr. Justice Powell stated:

> "Respondents contend that our recent ruling in Labine v. Vincent, 401 US 532, 28 L Ed 2d 288, 91 S Ct 1017 (1971), controls this case. In Labine, the Court upheld, against constitutional objections, Louisiana intestacy laws which had barred an acknowledged illegitimate child from sharing equally with legitimate children in her father's estate. That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. Id., at 538, 28 L Ed 2d at 293. The Court has long afforded broad scope to state discretion in this area.[8] Yet the substantial state interest in providing for 'the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents,' Labine v. Vincent, 229 So 2d 449, 452 (La App 1969), is absent in the case at hand."

Footnote 8 referred to in the above cited portion of the Court's opinion in *Weber* states as follows:

"The Court over a century ago voiced strong support for state powers over inheritance: 'Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.' Mager v. Grima, 8 How 490, 493, 12 L Ed 1168, 1170 (1850). See Lyeth v. Hoey, 305 US 188, 193, 83 S Ed 119, 123, 59 S Ct 155, 119 ALR 410 (1938)."

Thus the promulgation of laws of distribution and descent and of the particular statutory provision at issue here, that is, that an illegitimate child is only the heir of his or her mother and not his or her father, has been held by this Court to be a legitimate purpose of the state. These provisions embody the legislature's presumptions of the general intentions of Illinois residents in regard to disposition of their property, absent a will. The legislature has not attempted to differentiate, for example, between those in the same class of heirs. Children all share equally, regardless of whether they are minors or adults. Need is not a test, since wealthy adult children take two-thirds of their father's estate while a needy widow only inherits one-third. The State has not attempted to determine dependency; it has only attempted to determine to whom the decedent would probably want his property distributed, leaving him free to change that plan of distribution by the execution of a will, the creation of a joint tenancy or some other arrangement.

The Illinois Probate Act, therefore, has actually created a "statutory will" to be utilized by those

Illinois citizens who do not choose to dispose of their property upon their demise by some overt act during their lifetimes. In *In Re Estate of Pakarinen,* 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed,* 402 U.S. 903, 28 L.Ed.2d 644 (1971) the court recognized the concept of a statutory will in the following language:

"The laws of descent are a legislative attempt to provide for the orderly distribution of property left by an intestate decedent.

'* * * It has been said that the passing of property upon intestacy is pursuant to a statutory will, which * * * is considered to be such a distribution as the intestate presumably would have made had he made a will. The general policy is to follow the lead of the natural affections and to consider as most worthy the claims of those who stand nearest to the affections of the intestate.'" (Citation omitted) (178 N.W.2d at 717)

Krupp v. Sackwitz, 30 Ill.App.2d 450, 174 N.E.2d 877 (1961) was a proceeding wherein the plaintiff, who was the acknowledged illegitimate daughter of the deceased, sought to have herself declared his heir. The trial court denied relief and the Appellate Court of Illinois affirmed. The issue was the validity of the statutory provision which was the predecessor of the statute involved in this litigation. The court commented:

"The plaintiff's father may have lived in the belief that the laws of descent were satisfactory and so he died intestate. The courts are now asked to change the law after his death and divert his estate in a manner differing from that which he is presumed to have known to be the law.

> The trial judges ruled in accordance with established law. Whether that law should, or could properly, be changed, is a question for the legislature, and this court declines to usurp that function. The judgment of the Circuit Court is affirmed."
> (174 N.E.2d at 879)

The power to make a will is in the testator and not in the court. If the testator fails to dispose of any part of his property, the laws of descent and distribution will operate to distribute that part of his property that the will failed to do. *Chicago Daily News Fresh Air Fund v. Kerner*, 305 Ill.App. 237, 239-240, 27 N.E.2d 310, 311 (1940).

Sherman Gordon failed to execute a will, therefore it must be presumed that he intended to leave his property according to the statutory scheme adopted by the Illinois General Assembly and disinherit his illegitimate daughter. *Hedlund v. Miner*, 395 Ill. 217, 228, 69 N.E.2d 862 (1946); *Belfield v. Findlay*, 389 Ill. 526, 60 N.E.2d 403, 406 (1945); and *Ickes v. Ickes*, 386 Ill. 19, 53 N.E.2d 585, 591 (1944).

Aside from its interest in seeing that the wishes of its residents in the distribution of their property at death be carried out, the State of Illinois has a substantial and legitimate interest in seeing that controversies over the property and estates of the decedents be speedily and finally determined and that spurious claims of paternity and heirship not be made.

The Illinois Probate Act specifically provides:

> "This Act and the rules now or hereafter adopted pursuant thereto shall be liberally construed to the end that controversies and the rights of the parties may be speedily and finally determined; . . ." (Ill.Rev.Stat. 1975, ch. 3, §9)

The Louisiana Court of Appeal in *Labine v. Vincent*, 229 So.2d 449, 452 (La.App. 1969) *aff'd*, 401 U.S. 532 (1970) postulated a similar state interest in commenting that one of the purposes of Louisiana in enacting its probate laws was to provide for, "the stability of . . . land titles and . . . the prompt determination of the valid ownership of property left by decedents." This language, it will be remembered, was quoted by this Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170, 31 L.Ed.2d 768, 776 (1972) and previously cited herein.

Illinois also has a legitimate interest in preventing false and spurious claims against the estates of decedents and to this end section 12 of the Probate Act bears a substantial relationship to that purpose. This interest was recognized by the Supreme Court of Illinois in *In Re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975) (Appendix 39-52) wherein the court noted:

> "We further recognize that the State maintains an interest in prohibiting spurious claims against an estate. The parties to these appeals tend to agree that proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors. It is suggested that proof of paternal relationship may not be so readily ascertainable but that such considerations should be decided individually on the facts of each case. While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances. There exists the possibility that an illegitimate "grandson" may seek to inherit from his "grandfather" who dies not only intestate but also after the death of his own son and without knowledge of the existence of the illegitimate. Similar circumstances might also arise

> in which illegitimates, claiming a collateral relationship, would seek rights to the estates of paternal intestate kindred. (See generally *Gregory v. County of LaSalle* (1968), 91 Ill.App.2d 290.) There also may be situations in which a "father's" testamentary disposition is challenged on behalf of an illegitimate child who was born after the will was executed, thereby possibly permitting the child to recover a share of the estate equivalent to that allowed if the "father" had died intestate. Ill.Rev.Stat. 1973, ch. 3, par. 48; 2 Homer, Probate Practice and Estates sec. 1331 (4th ed. 1960)" (329 N.E.2d at 240-41, Appendix 48-59)

The Illinois court was obviously enunciating one of the major problems sought to be remedied by prohibiting illegitimates from inheriting from and through their fathers. Imagine the dilemma of the "grandmother" in the hypothetical situation alluded to above where her husband has recently died, her son and only child long since having predeceased his father and the illegitimate child of her son now appears, claiming, pursuant to Illinois' law of descent (Ill.Rev. Stat. 1975, ch. 3, §11(1)[6]), two-thirds of the estate, that being the share his "father" would have inherited had he survived his father (the hypothetical "grandfather").

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[6]"§11. Rules of Descent and Distribution.)

The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:

(1) If there is a surviving spouse and also a descendant of the decedent: one-third of the entire estate to the surviving spouse and two-thirds to the decedent's descendants per stirpes."

This Court recognized the validity of the State's interest in preventing false claims in *Jiminez v. Weinberger*, 417 U.S. 628, 636, 41 L.Ed.2d 363, 370 (1974) where Chief Justice Burger stated:

> "We recognize that the prevention of spurious claims is a legitimate government interest . . ."
> (417) U.S. at 636, 41 L. Ed. 2d at 370)

The provisions of section 12 of the Illinois Probate Act are rationally related to the State's interest in preventing false claims. It is reasonable to differentiate between inheriting from one's mother as opposed to the father when one considers that the mother will always know that the child is hers while the father may never even know of the existence of the child. It is extremely difficult, if not impossible to make a false claim of maternity with any success, however it has been shown that claims of paternity frequently are erroneous. H. Krause, "Scientific Evidence and the Ascertainment of Paternity", 5 Family Law Q. 252, 254 at n.11 (1971) reports that a study of blood grouping tests in 1000 cases of disputed paternity indicated that 39.6% of the accused men were not actually the fathers of the children in question.

The impact of section 12 can be easily and readily avoided by the simple procedure of the father executing a will. In Sherman Gordon's case, since he had no surviving spouse who could have renounced his will pursuant to sections 16, 16a and 17 of the Probate Act *supra*, he could have left his entire estate to his illegitimate daughter. A simple one page will would have sufficed. *In Re Estate of Karas*, 21 Ill.App.3d 564, 315 N.E.2d 603 at 606 (1974).

Summary

The interest of the State of Illinois in the prompt and final determination of controversies over the property and estates of decedents, in seeing that such property and estates are distributed in accordance with the wishes of those decedents and the prevention of spurious and false claims against estates is a legitimate interest and bears a reasonable and rational relationship to the distinctions drawn in section 12 of the Probate Act. That section thus meets the test of constitutionality under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and should be upheld.

II.

LABINE V. VINCENT IS DISPOSITIVE OF THE ISSUE HERE AND SHOULD BE FOLLOWED AS CONTROLLING PRECEDENT

The precise issue presented by this case has been decided by this Court in *Labine v. Vincent*, 401 U.S. 532, 28 L.Ed.2d 288 (1971). Appellants urge that the Supreme Court of Illinois erroneously relied on *Labine* in deciding *In Re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975), and that that reliance was an unwarranted expansion of *Labine*. They further argue that *Labine* is "essentially limited to its facts" and that alternatively, *Labine* should be reconsidered in light of intervening decisions and overruled.

The decision in *Labine* upheld a Louisiana statutory scheme which precluded acknowledged illegitimate

children from inheriting equally with legitimate children where the father died intestate. Mr. Justice Black, speaking for five members of the Court stated:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collateral relations, as opposed to ascendants, and against ascendants, as opposed to descendants. Other rules determining property rights based on family status also 'discriminate' in favor of wives and against 'concubines'."
> (401 U.S. at 537-538, 28 L.Ed.2d at 293) (footnotes omitted)

The Court concluded that the Equal Protection Clause did not empower the Court to "nullify the deliberate choices of the elected representatives of the people of Louisiana". (401 U.S. at 540, 28 L.Ed.2d at 294)

The Supreme Court of Illinois, in relying on *Labine* in *In Re Estate of Karas, supra*, was presented with the argument that several United States Supreme Court decisions (See Appendix, 45) "have severely lessened the vitality of Labine." In disposing of that argument, which is again presented here, the court stated:

"We have examined these decisions and do not find the constitutional impact of *Labine v. Vincent* to have been lessened. As previously set forth, *Weber v. Aetna Casualty & Surety Co.* explained *Labine v. Vincent,* and expressed no dissatisfaction with that decision."
(329) N.E.2d at 239, Appendix, 46)

We have previously quoted the citation in *Weber v. Aetna Casualty & Surety Co., supra,* which indicates this Court's continuing satisfaction with the *Labine* decision and *Labine's* present vitality.

The *Labine* decision has been followed by the courts. In *Watts v. Veneman,* 476 F.2d 529 (D.C. Cir. 1973), the illegitimate children of a deceased wage earner brought an action seeking Social Security benefits allegedly due them as a result of their father's death. One of the requirements necessary for the children to meet in order to receive benefits was the right to inherit under the intestacy laws of the wage earner's domicile. The District of Columbia, the domicile, had an intestacy law almost identical to the Illinois statute at issue here, providing that illegitimates may inherit from their mother and not their father. The children claimed the statutory scheme violated due process. The court denied the argument citing *Labine* and noting:

"The entire thrust of the Social Security laws relevant to dependents is to provide benefits to those who were most likely to have relied upon the deceased for their support. In light of this overriding purpose, it is well-established that Social Security benefits are not accrued property rights. One's ability to receive benefits is not dependent solely upon the biological relationship between the decedent and his children, but also upon the probability that the children were dependent for support upon the deceased.

Congress in enacting the Social Security laws made various judgments about the probability that children are dependent. For example, it seems more logical that illegitimates would be dependent upon their father if he has recognized them, or if in fact he is contributing to their support. The incorporation of a state's intestacy laws for purposes of determining eligibility is in furtherance of this scheme. If an illegitimate child may not inherit, then the child's support following the father's death is less likely to be dependent upon what was received upon the deceased's death than if the child could receive property following the wage earner's demise." (476 F.2d at 533) (footnotes omitted)

The court in *Watts* obviously adopted the reasoning in *Labine* that the state had a legitimate concern in promulgating laws of intestacy and it was for the legislature (in *Watts,* Congress) and not the court to exercise the power to make rules regulating the disposition of intestate property.

Labine was likewise followed and considered decisive of the issue in *In Re Estate of Hendrix,* 326 N.Y.S.2d 646 (1971). In that case the alleged illegitimate daughter of the famed "rock" music star, Jimi Hendrix, sought to be declared his sole heir. An adjudication of paternity had not been made prior to Hendrix' death as required by the pertinent New York Statute in order to allow the child to inherit from her father. The court in *Hendrix* denied the child's application and held that the statute did not amount to a denial of equal protection of the law to the illegitimate.

The Supreme Court of Illinois has once again recently cited *Labine* with approval. In *Cessna v. Montgomery,* ___Ill.2d___, 344 N.E.2d 447 (1976), the

court upheld the validity of the two-year statute of limitation for paternity suits in the face of a claim by the plaintiffs that the statute denied equal protection to an illegitimate child because his right of support from his father was conditioned on establishing paternity within two years (unless there is formal acknowledgement), while no conditions attached to the support rights of legitimate children. Plaintiffs relied on numerous cases, among them, *Levy*, *Glona*, *Weber*, *Gomez* and *Jiminez*. The court distinguished each and cited *Labine*, noting that it had been followed in *Karas*.

Thus it is apparent that this Court's decision in *Labine* has been repeatedly cited with approval and followed as precedent. It is dispositive of the issue in this case. The argument that to apply it to the factual situation now before the Court would be an unwarranted expansion of its holding is to miss the point that Justice Black's opinion applies with more force to this case than it did to the facts in *Labine*. Ezra Vincent, the decedent in *Labine* could only have left one-third of his property to his illegitimate daughter had he executed a will, 401 U.S. at 539, 28 L.Ed.2d at 294, while the decedent in this case, Sherman Gordon, could have left his entire estate to his illegitimate daughter by executing a will since he had no surviving spouse who could have renounced such a will. Ill.Rev.Stat. 1975, ch. 3, §§16, 16a and 17. Instead Gordon chose to disinherit his daughter by adopting the "statutory will" provided for in the Illinois Probate Act. This was his choice, he was free to make it and it should not be disturbed.

Moreover the doctrine of *stare decisis* would dictate that this Court now follow its decision in *Labine v. Vincent* which is only five years old. As former Justice

Goldberg has written in adopting the language in *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting), *vacated on rehearing*, 158 U.S. 601 (1895):

> "The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."
> (Goldberg, "Equal Justice," 78 (1971)) (footnote omitted)

III.

SECTION 12 OF THE ILLINOIS PROBATE ACT DOES NOT DENY EQUAL PROTECTION OF THE LAWS ON THE BASIS OF SEX

The provisions of section 12 of the Illinois Probate Act that provide that an illegitimate child may inherit from his or her mother but not from his or her father make no distinction based on the sex of the child. As the Supreme Court of Illinois noted in *In Re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975):

> "No contention is asserted that section 12 of the Probate Act results in any sexual discrimination as between similarly situated males and

> females who seek inheritance from the estates of their fathers or other paternal kindred. Under section 12 no discrimination inures to an illegitimate as a result of the illegitimate's sex."
> (329 N.E.2d at 241) (Appendix, 50)

Thus section 12 clearly treats male and female illegitimate children on exactly the same basis and makes no differentiation between them as to inheritance rights. As the Appellate Court of Illinois stated in its decision in *Karas:*

> "Nor do we see any way in which the statute discriminates between illegitimates on the basis of sex, as if for instance the statute would only permit male illegitimates to inherit. Therefore this portion of her argument is not persuasive."
> (*In Re Estate of Karas,* 21 Ill.App.3d 564, 315 N.E.2d 603, 606)

Appellants argument that the child has been discriminated against on the basis of her sex is, therefore, totally devoid of merit.

Appellants and *amicus* both make the further argument that section 12 discriminates against the child's mother on account of her sex (we seriously question the right of both the mother and child to present such argument in this Court as will be seen *infra*) for the reason that the mother receives no assistance in her financial support of the child through an inheritance from the father, which inheritance is prohibited, while the child is allowed to inherit from the mother, thus easing the father's financial burden in supporting the child. *Amicus* extends the argument by postulating that the distinction in section 12 deprives a father from providing for his child upon his death unless he executes a valid will while no such act is

required of the mother who can provide for the child intestate. The argument of *amicus* in this last regard is without reason. The parties to this case do not include a complaining father, therefore the issue raised that a father has been deprived of the right to provide for his child intestate is not present in this case. *Amicus* cannot seriously object to the statute as it affects the mother's right to provide for an illegitimate without the necessity of a will, since the provision obviously eases the burden of a woman in that respect. *Amicus* further argues that the right of a person to dispose of his or her property intestate is a fundamental right thus causing it to be measured by a strict standard of review regardless of whether sex is a "suspect" classification, which it is not. No case is cited to support this last theory. In any event, the entire argument is without merit.

Turning now to the theory that the mother has been discriminated against on the basis of her sex, it must be noted at the outset that no decision of this Court has definitively held that sex is a "suspect" classification thus requiring that a classification by sex be subject to a strict judicial scrutiny. It is true that in *Frontiero v. Richardson,* 411 U.S. 677, 36 L.Ed.2d 583 (1973) four members of this Court speaking as a plurality held that statutory classifications based upon sex were inherently suspect and therefore subjected to close judicial scrutiny. In *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225 (1971), this Court held invalid an Idaho statute which specifically gave preference to males over females in the appointment of administrators of estates. However, the decision in *Reed* is not based on any finding that sex is a "suspect" class and therefore subject to strict scrutiny, but is rather based on the fact

that a difference in the sex of competing applicants for letters of administration does not bear a rational relationship to a state objective. Likewise the decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 43 L.Ed.2d 514 (1975) that men as well as women were entitled to survivors' benefits under the Social Security Act was not based on a finding that the sex classification was subject to strict scrutiny. *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972) was not decided on a sex classification but rather on unequal treatment of parents.

Since a sex classification is not open to strict scrutiny it must be determined if the statutory distinction bears a rational relationship to a legitimate state purpose. Appellee submits that this inquiry must be answered in the affirmative.

The distinction between mothers and fathers in section 12 is grounded upon a reasonable biological basis. All women are necessarily present at the birth of their children while the father of an illegitimate may not even be aware of his or her existence. As noted by the Supreme Court of Minnesota in *In Re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970):

> "While the identity of the mother of an illegitimate child is usually, if not always, easy to establish, even the mother is not always sure who the father is. Where a putative father denies paternity, no method of proof we are now aware of exists by which fatherhood can be conclusively established. Nothing–not a blood test, nor a judgment of paternity after trial, nor a voluntary plea of guilty to a charge of paternity in open court–proves with absolute certainty the paternity of the father."
> (178 N.W.2d at 718)

The fact that it is more difficult to determine the paternity than the maternity of an illegitimate child renders it constitutionally permissible to differentiate between the rights of illegitimates to inherit from their fathers as opposed to their mothers. It is a necessary distinction based upon the difficulties of proof and bears a rational relationship to the legitimate state purposes of regulating disposition of intestate property and fostering the orderly administration of estates by preventing false and spurious claims of paternity. That it tends to discriminate against women does not deprive them of equal protection of the law because as this Court said in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L.Ed. 369, 377 (1910):

> "A classification having some reasonable basis does not offend against [the Equal Protection Clause of the Fourteenth Amendment] merely because it is not made with mathematical nicety or because in practice it results in some inequality."

IV.

THE ISSUE OF THE ALLEGED DENIAL OF EQUAL PROTECTION ON THE BASIS OF SEX HAS NOT BEEN PROPERLY PRESERVED FOR REVIEW BY THIS COURT

A serious question exists as to whether the issue of unconstitutional discrimination on the basis of sex is properly before this Court and although Appellee has chosen to meet that argument we feel compelled to call the Court's attention to the fact that the issue may not have been preserved for review.

The only pleading filed by Appellants in this cause was filed in the trial court and was entitled, "Petition for Letters of Administration, Determination of Heirship, Declaratory and Injunctive Relief (Including Paternity Order)" (Appendix, 3-6 wherein the pleading is reproduced in full). The introductory paragraph of that petition which appears directly before paragraph number one (1) states:

> "JESSIE TRIMBLE for and on behalf of her minor child DETA MONA TRIMBLE, on oath states:"
> (Appendix, 3)

The pertinent paragraph of the petition that first raises a constitutional question and is the only pleading found anywhere in the record that alleges that section 12 of the Illinois Probate Act violates the illegitimate's right to equal protection of the laws under the Fourteenth Amendment states as follows:

> "11. For the State to provide by common law, statute or interpretation of statute that a legitimate child is the heir of its father, but an illegitimate is not the heir of its father, violates and contravenes the illegitimate child's rights to due process and equal protection of the laws as guaranteed by Article I, Section 2 of the Constitution of the State of Illinois, and the Fourteenth Amendment to the Constitution of the United States." (Appendix, 4-5)

Nowhere does the petition allege that the constitutional rights of the mother, Jessie Trimble have been violated on account of her sex or any other reason. Nowhere does the petition pray for any substantive relief for and on behalf of Jessie Trimble. Nowhere does the petition allege that the child has been

discriminated against because of her sex. As a matter of fact a careful examination of the wording of the allegations in paragraph 11 of the petition leads to the conclusion that sex discrimination against either the child or the mother was not in the mind of the pleader nor can it be inferred because the basis for the alleged unconstitutionality was that a legitimate child was the heir of his father while an illegitimate was not. Nowhere is it alleged that the denial of equal protection is caused by the fact that the illegitimate can inherit from his or her father rather than his or her mother. Moreover, this pleading was brought by the mother in a representative capacity only, as evidenced by the introductory paragraph quoted above. She was not a real party in interest to the litigation except for the fact that she asked to be appointed administrator of the estate, but even that request was, "as mother and next friend" of the child. (See Appendix, 5, paragraph number 3)

It has been held that this Court is not compelled to decide issues not raised in the lower court, *California v. Taylor*, 353 U.S. 553, 557 n.2, 1 L.Ed.2d 1034 (1957); *Lawn v. United States*, 355 U.S. 339, 362 n.16, 2 L.Ed.2d 321 (1958); *De Backer v. Brainard*, 396 U.S. 28, 32, 24 L.Ed.2d 148, 153 (1969); *Moore v. Illinois*, 408 U.S. 786, 799, 33 L.Ed.2d 706, 716 (1972), but as pointed out in *Youakim v. Miller*, ___U.S.___, 47 L.Ed.2d 701, 705 (1976) (citing other cases) the rule is not inflexible and can give way under exceptional circumstances.

Appellees contend that the issue of the alleged denial of equal protection based on sex was not preserved for review by this Court because it was not presented at the trial court level. The issue has,

however, been briefed by all parties and we will respectfully and naturally adhere to the Court's discretion in this regard.

CONCLUSION

Section 12 of the Illinois Probate Act which prohibits illegitimate children from inheriting from or through their fathers bears a rational relationship to a legitimate state purpose and therefore is not violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Appellee, Ethel Mae King respectfully requests that this Court affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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